Office - Supreme Court, U.S.
FILED
OCT 30 1981
ALEXANDER L. STEVAS,

Nos. 79-1738 and 80-945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD NIXON,

Petitioner,

v.

A. ERNEST FITZGERALD,

Respondent.

BRYCE N. HARLOW and
ALEXANDER P. BUTTERFIELD,

Petitioners,

v.

A. ERNEST FITZGERALD,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF THE GOVERNMENT ACCOUNTABILITY PROJECT OF THE INSTITUTE FOR POLICY STUDIES AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

LOUIS ALAN CLARK
(Counsel of Record)
Director
Government Acccuntability Project
Institute for Policy Studies
1901 Que St., N.W.
Washington, D.C. 20009
(202) 234-9382

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

The Government Accountability Project of the Institute for Policy Studies (the Project) respectfully moves the Court for leave to file the attached *amicus curiae* brief. The Project offers the following considerations in support of its motion:

1. The Government Accountability Project of the Institute for Policy Studies is a non-profit public interest group formed in 1975 to help restore and maintain confidence in the federal government by making public officials accountable for their activities. The Project receives no government funds. It is supported through the individual contributions of interested citizens and grants from private foundations.

2. In pursuit of its goal of accountable government the Project works to broaden public understanding of the role of the federal employee in preventing government waste, fraud and abuse.

3. The Project has been especially concerned about civil servants whose careers are destroyed for having spoken out against government wrongdoing or waste. Through public education, selective legal action, public comments to government agencies and, upon request, testimony before Congress, the Project works to protect the First Amendment rights of all

federal employees to initiate constructive criticism without fear of retaliation, and to provide these men and women of conscience with vital support.

4. The Project has published *A Whistleblower's Guide to the Federal Bureaucracy* in an attempt to assist those who are considering blowing the whistle about problems within their government workplace. From time to time Project personnel write articles and speak publicly about the need to protect whistleblowers.

5. The Government Accountability Project of the Institute for Policy Studies along with the Fund for Constitutional Government offered an *amicus curiae* brief to the Court in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979). The Project also presented an *amicus curiae* brief in each of two cases before the United States Court of Appeals for the District of Columbia Circuit entitled *Frazier v. Merit Systems Protection Board*.

6. Not only has the Project testified before committees of the United States Congress on issues related to First Amendment rights and whistleblower protections, but it has also presented testimony in both houses of Congress on the issue of liability for high government officials who engage in constitutional violations against American citizens. The Project

has again received an invitation to testify about this issue before the Senate Judiciary Committee.

7. The *amicus curiae* brief is unique because it takes the position that given a willful violation of an individual's First Amendment rights only qualified immunity for the alleged violator will protect the interest of the individual, as well as the effective operation of the government. The Project has given serious consideration to the effect that the grant of absolute immunity for high government officials will have upon government employees as well as the nation. The ramifications of granting absolute immunity to executive officials who have allegedly violated the First Amendment would be, in the Project's opinion, far-reaching and disastrous. Executive officials could then do through their actions what they cannot command by law.

8. *Amicus'* efforts on behalf of federal employees are made in implementation of a belief that a professional, dedicated civil service is essential to an effective democracy. Civil servants are a vital link between our government and the people it serves. They are a bulwark against those who would corrupt our institutions.

It is with these thoughts and these interests in mind that the Government Accountability Project respectfully moves the Court to accept its *amicus curiae* brief.

Respectfully submitted,

Louis Alan Clark

Counsel of Record and Attorney for the Amicus Curiae

Government Accountability Project of the Institute for Policy Studies
1901 Que St., N.W.
Washington, D.C. 20009

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Motion for Leave to File *Amicus Curiae* Brief on Behalf of the Government Accountability Project of the Institute for Policy Studies and the attached *Amicus Curiae* brief have been mailed this date, by regular mail, to:

John E. Nolan, Esq.
Steptoe & Johnson
1250 Connecticut Avenue, N.W.

Elliot Richardson, Esq.
Milbank, Tweed, Hadley & McCloy
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

R. Stan Mortenson, Esq.
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W. Suite 500
Washington, D.C. 20037

Dated: _____

_____
Louis Alan Clark

Nos. 79-1738 and 80-945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD NIXON,

Petitioner,

v.

A. ERNEST FITZGERALD,

Respondent.

BRYCE N. HARLOW and
ALEXANDER P. BUTTERFIELD,

Petitioners,

v.

A. ERNEST FITZGERALD,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMICUS CURIAE THE GOVERNMENT ACCOUNTABILITY PROJECT OF THE INSTITUTE FOR POLICY STUDIES

LOUIS ALAN CLARK
(Counsel of Record)
Director
Government Accountability Project
Institute for Policy Studies
1901 Que St., N.W.
Washington, D.C. 20009
(202) 234-9382

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....i

INTEREST OF AMICUS CURIAE.....1

STATEMENT OF THE CASE.....4

SUMMARY OF ARGUMENT.....9

ARGUMENT.....15

I. Absolute Presidential Immunity for Any Act, First Amendment Violations that Circumvent the Civil Service System and Stifle the Flow of Information to Congress, Would Abdicate the Premises of Government Accountability in *Butz v. Economou*.....15

II. *Butz v. Economou* Mandates That Damages are Essential to Provide Comprehensive Relief, to Deter Future Constitutional Abuses and to Reduce the Chilling Effect of Uncertain First Amendment Coverage.....38

CONCLUSION.....54

TABLE OF AUTHORITIES

Cases:

Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976).....44

Bivens v. Six Unknown Narcotics Agents, 403 U.S. 388 (1971).....23,43,49

Cases continued:

Bivens v. Six Unknown Narcotics Agents, 456 F.2d 1339 (2d Cir. 1972).....23,24
Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872)..... 17
Bush v. Lucas, 647 F.2d 573 (5th Cir. 1981).....44-45
Butler v. United States, 365 F. Supp. 1035 (D. Haw. 1973).
Butz v. Economou, 438 U.S. 478 (1978)..9,15,16,17,18,21,25,38,43,49
Carey v. Piphus, 435 U.S. 247 (1978).....39,41,47
Carlson v. Green, 446 U.S. 14 (1980).....44,45,49-50
Donovan v. Reinbold, 433 F. 738 (9th Cir. 1970).....41-43
Downs v. Conway School District, 328 F. Supp. 338 (E.D. Ark. 1971).....47
Fitzgerald v. United States Civil Service Commission, 554 F.2d 1186 (D.C. Cir. 1977).....46
Fitzgerald v. Seamans, 553 F.2d 220 (D.C. Cir. 1977).....7-8
Fitzgerald v. Hampton, No. 76-1486 (D.D.C. Mar. 3, 1981).....46
Forsyth v. Kleindeinst, 599 F.2d 1203 (3rd Cir. 1979).....22
Frazier v. Merit Systems Protection Board, No. 80-1986 (D.C. Cir. 1981) and No. 80-1067 (D.C. Cir. 1980)..... 3
Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979).. 2
Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949).....23-24
Hanson v. Hoffman, 628 F.2d 42 (D.C. Cir. 1980).....27
Imbler v. Pachtman, 424 U.S. 409 (1976)..17
Marcus v. Search Warrant, 367 U.S. 717 (1961).....43

Cases continued:

National Treasury Employees Union v. Reagan, No. 81-1294 (D.C. Cir. August 11, 1981).....19
Patton v. LaPrade, 524 F.2d 862 (3d Cir. 1975).....44
Pickering v. Board of Education, 391 U.S. 563 (1968).....25-26,45
Pierson v. Ray, 386 U.S. 547 (1967).....17
Porter v. Califano, 592 F.2d 770 (5th Cir. 1979).....36-37
Scheuer v. Rhodes, 416 U.S. 232 (1974).....9-10
Stanford v. Texas, 379 U.S. 476 (1965)..43
Stolberg v. Members of Bd. of Trustees for the State Colleges of the State of Connecticut, 474 F.2d 485 (2d Cir. 1973).....41-42
Swaaley v. United States, 376 F.2d 857 (Ct. Cl. 1967).....47
Vitarelli v. Seaton, 359 U.S. 535 (1959).....19

Statutes:

Civil Service Reform Act, 5 U.S.C. § 2302 (b)(8).....29-30
5 U.S.C. § 1101 (Supp. III 1979).....3
Government Employees Code of Ethics PL 96-303 (July 3, 1980).....48
5 U.S.C.§7211.....8,31,32
18 U.S.C. § 1505.....9
42 U.S.C. § 1983.....40-41

Legislative Materials:

Civil Service Reform Oversight Hearings before the Subcomm. on Civil Service of the House Post Office Comm., 96th Cong., 2d Sess. (1980).....3,52

Legislative materials continued:

Dismissal of A. Ernest Fitzgerald by the Department of Defense: Hearings before the Subcomm. on Economy in Government of the Joint Economic Comm., 91st Cong., 1st Sess. (1969).....6
Economics of Military Procurement: Hearings before the Subcomm. on Economy in Government of the Joint Economic Comm., 90th Cong., 2d Sess.,(1968-69).....5
Report of the Senate Committee on Governmental Affairs on S. 2640, Rep. No. 95-969, 95th Cong., 2d Sess. (1978).....30-31
48 CONG. REC. 10671 (1912).....33-34
Appendix to 48 CONG. REC. 140 (1912).32-33
97 CONG. REC. 4393 (1951).....35-36

Law Review Articles:

Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L.Rev. 1 (1972).....23
Free Speech and Impermissible Motive in the Dismissal of Public Employees, 89 Yale L.J. 376 (1979).....26

Other Authorities:

Government Accountability Project, *A Whistleblower's Guide to the Federal Bureaucracy* (1977).....2
Merit Systems Protection Board Office of Merit Systems Review and Studies, *Do Federal Employees Face Reprisal for Reporting Fraud, Waste or Mismagement?* (1981).....51-52
T. Emerson, *The System of Freedom of Expression* (1970).....28-29,52

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD NIXON,

Petitioner,

v.

A. ERNEST FITZGERALD,

Respondent.

BRYCE N. HARLOW and
ALEXANDER P. BUTTERFIELD,

Petitioners,

v.

A. ERNEST FITZGERALD,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMICUS CURIAE THE GOVERNMENT ACCOUNTABILITY PROJECT OF THE INSTITUTE FOR POLICY STUDIES

INTEREST OF AMICUS

The Government Accountability Project (GAP) of the Institute for Policy Studies is a non-profit public interest group formed in 1975 to help restore and maintain confidence in the federal system by making

public officials accountable for their activities. In pursuit of these goals, GAP works to broaden public understanding of the role of the federal employee in preventing government waste and corruption.

GAP has been especially concerned about civil servants whose careers are destroyed for having spoken out against government wrongdoing. Through public education, legislative efforts and selective legal action, GAP works to protect the First Amendment right of all federal employees to initiate constructive criticism without fear of retaliation, and to provide these men and women with vital support. *See, e.g.*, GAP's publication, *A Whistleblower's Guide to the Federal Bureaucracy* (1977). *Also see* Brief for Amici Curiae The Fund for Constitutional Government and the Government Accountability Project of the Institute for Policy Studies, *Givhan v. Western Line Consolidated School District*,

439 U.S. 410 (1979). GAP has particularly concentrated on implementation of the "whistleblower" protections of the Civil Service Reform Act of 1978, §§ 101, 201, 5 U.S.C. § 1101 (Supp. III 1979). *See Civil Service Reform Oversight, 1980--Whistleblower: Hearings before the Subcommittee on Civil Service of the House Post Office Committee*, 96th Cong., 2d Sess. 45-71 (1980); Briefs for Amicus Curiae The Government Accountability Project of the Institute for Policy Studies, *Frazier v. Merit Systems Protection Board*, No. 80-1067 (D.C.Cir., filed May 20, 1980); *Frazier v. Merit Systems Protection Board*, No. 80-1986 (D.C.Cir., filed January 6, 1981).

Amicus' efforts on behalf of federal "whistleblowers" are made in implementation of a belief that a professional and dedicated civil service is essential to an effective democracy. Civil servants are a

vital link between our government and the people it serves. They are a bulwark against those who would corrupt our institutions. Amicus believes that to preserve not only the integrity and independence of the federal civil service, but also the responsiveness of the federal bureaucracy to the general public, conscientious individuals who wish in good faith to point out illegal or questionable practices must not be forced to choose between their jobs or silence.

STATEMENT OF THE CASE

A. Ernest Fitzgerald - respondent in this case - is Deputy for Productivity Management, U.S. Department of the Air Force. In 1968 as Deputy Assistant Secretary for Management Systems, Office of the Assistant Secretary of the Air Force for Financial Management, he was a key Pentagon cost control expert. His unblemished

record of government service included consistently "Outstanding" performance evaluations, numerous honors and nominations for the Citation of Honor and the Distinguished Civilian Service Award. On November 13, 1968, in response to an invitation and with the express approval of the Department of Defense, respondent testified before a subcommittee of the Joint Economic Committee of the Congress. When asked if there would be a $2 billion cost overrun on a significant military acquisition, the C-5A cargo airplane, respondent truthfully reported that the figure was approximately correct. *Economics of Military Procurement: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Committee,* 90th Cong., 2d Sess., 199-200 (1968-69).

His testimony neither directly criticized any Department of Defense employees, nor discussed confidential or classified

information. Publicly his superiors did not challenge the accuracy or propriety of his testimony. Nevertheless, his career plummeted. His responsibilities immediately shrank from oversight of major weapons systems to assignments such as investigating allegations of cost overruns at bowling alleys in Thailand. His staff was removed and his status as a career employee in the civil service system was revoked. *See generally The Dismissal of A. Ernest Fitzgerald by the Department of Defense: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Committee,* 91st Cong., 1st Sess. (1969).

On January 6, 1969, two months after the testimony, John Lang, Administrative Secretary of the Air Force, prepared a memorandum outlining three ways which could result in respondent's departure. Respondent became aware of the memorandum two days later. His superior showed it to

him to let him know that he was no longer useful to the Air Force, as a result of his testimony and the ensuing publicity. Among others Lang listed reduction-in-force (RIF), the method which was used eventually. In May 7, 1969 testimony before the House Armed Services Committee, the Secretary of Defense accused respondent of leaking confidential documents, a charge which proved groundless. Also in May 1979, respondent was investigated on conflict-of-interest allegations, which also proved groundless and were dropped. *Fitzgerald v. Seamans*, 553 F.2d 220, 223-24 (D.C.Cir. 1977).

On November 4, 1969 respondent's position was abolished in a RIF, effective January 5, 1970. Secretary Seamans explained to Congressmen and Senators in November that respondent was laid off because he was not a "team player." Secretary of Defense Melvin Laird testified before the House Appropriations Committee

that respondent had been "fired" although his C-5A estimates were accurate. *Fitzgerald v. Seamans, supra,* at 224. On January 2, 1970 respondent appealed his termination to the Civil Service Commission and on September 18, 1973 was ordered reinstated to an equivalent position with back pay, based on a finding that " the agency's decision to abolish Mr. Fitzgerald's position and to include him in the Project 703 reduction-in-force improperly resulted from and was influenced by reasons purely personal to the appellant; and was for the purpose of terminating his employment with the Air Force." *Id.* at 222-23, citing Decision of CSC Chief Appeals Examiner, September 18, 1973, at 19-20.

In January 1974 respondent initiated the present suit for damages. The district court has stated that the complaint states valid claims under the First Amendment, 5 U.S.C. § 7211 (employees' right to

petition Congress) and 18 U.S.C. § 1505 (felony for obstructing congressional witness). Petitioners Nixon, Butterfield and Harlow moved for summary judgment on the grounds of absolute immunity. On March 26, 1980, the district court denied the availability of absolute immunity, citing *Butz v. Economou*, 438 U.S. 478 (1978), and *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Nixon Petition for Certiorari, Appendix A, 1a-5a. On April 30, 1980 the court of appeals granted respondent's motion to dismiss petitioners' appeal. *Id.* Appendix D, 35a-36a.

SUMMARY OF ARGUMENT

Petitioners' call for absolute immunity for any act of the President and top assistants cannot coexist with the principles and holding of *Butz v. Economou*, which culminated a long trend of decisions

holding all government officials liable for deliberate constitutional violations, with certain carefully limited exceptions. All of the exceptions limit absolute immunity to actions taken within the forum where the officials legitimately have direct authority and where abuses are limited by or are even a function of checks and balances built into the forum. Absolute immunity for adjudicatory decisions is limited to actions by officials whose positions are structurally isolated from political pressure. Petitioners, on the other hand, represent the zenith of political pressures. While their responsibilities are immense, they do not justify a claim to unlimited authority. Even a President cannot claim that it is a prerogative of office to fiat away the protections of the civil service system and to trample with impunity upon the First Amendment.

In *Scheuer v. Rhodes*, the Court reasoned

that all government employees, from clerk to governor, state or federal, can function effectively without being granted a blank check to violate the Constitution. Indeed, *Butz* cautioned that the broader the scope of general authority, the greater the potential for massive abuse. Rather than fears of government paralysis if a President who abuses the First Amendment is held liable, the relevant concern is the functional paralysis of nearly three million federal civil service employees if absolute immunity were granted.

Pickering v. Board of Education recognized that First Amendment violations interrupt the free flow of information needed to develop federal policies. It long has been recognized that the open exchange of ideas is a foundation of the checks and balances "essential for the conduct of public business." The Civil Service Reform Act of 1978 established a national policy that

legitimate government whistleblowers should not be subject to retaliation due to lawful disclosures. While the preconditions for constitutionally protected speech represent a difficult burden to establish, the value of the speech is undeniable for the public interest. The catalyst for the retaliation alleged in this case, disclosure at a congressional hearing of a $2 billion cost overrun, illustrates the fundamental stakes involved in First Amendment violations -- threats to the separation of powers by suppressing the free flow of information that Congress must have to fulfill its constitutionally-mandated oversight role; and compromises to the national security through the suppression of disclosures of gross waste in major military acquisitions.

Butz requires that damages be an appropriate remedy for the constitutional violation before liability will be imposed. Freedom of expression is appropriate as

one of the personal liberties *Butz* seeks explicitly to protect. Indeed, damages are essential to provide a comprehensive remedy for a victim of unconstitutional First Amendment retaliation. Respondent's experience illustrates that reinstatement and back pay are pyrrhic victories for a truth-teller who incurs the wrath of a President. Respondent is still struggling to enforce a decision initially made eight years ago that theoretically returned him to his 1968 responsibilities. He has been emotionally battered, unjustly accused of serious misconduct, investigated and forced to incur crippling debts while obtaining three reinstatement decisions that have represented little more than paper victories. The only way to avoid this fate would have been to abandon his duty to the public and to lie to Congress. Merely to honestly do his job, respondent had to make an untenable choice between sacrificing the public interest or

sacrificing his professional future. Only damages can adequately compensate an individual whose constitutional rights are violated because he insists on upholding his public trust.

Further, *Butz* explicitly considers the importance of deterring future constitutional violations as a criterion for the award of damages. In the case of First Amendment violations, the public interest demands individual liability for damages to achieve this goal, particularly when the transgressor is the President or a top assistant. Freedom of expression is the bedrock of accountable government, and the public interest requires liability for damages as a deterrent to First Amendment violations. Passage of the Civil Service Reform Act heightens the need for damages to deter presidential abuses, since it tacitly exempts the President from disciplinary sanctions. Further, the Reform Act

cedes decisionmaking authority to the President for sanctions against assistants who may have been carrying out his wishes by retaliating against whistleblowers. In short presidential violations of a government employee's First Amendment rights represent a classic case where the employee's ability to sue for damages may be the *only* individual means of pursuing the *Butz* goal of deterrence.

ARGUMENT

I. ABSOLUTE PRESIDENTIAL IMMUNITY FOR ANY ACT, INCLUDING FIRST AMENDMENT VIOLATIONS THAT CIRCUMVENT THE CIVIL SERVICE SYSTEM AND STIFLE THE FLOW OF INFORMATION TO CONGRESS, WOULD ABDICATE THE PREMISES OF GOVERNMENT ACCOUNTABILITY IN *BUTZ v. ECONOMOU*.

Petitioner Nixon seriously misconstrues the Court's holding in *Butz v. Economou*, 438 U.S. 478 (1978). In *Butz* the Court stated:

> We...hold that, in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer*.... *Id.* at 507.

Petitioners argue that absolute immunity for the President and senior presidential advisors is necessary under *Butz* as "essential for the conduct of the public business." (Pet. Nixon's Brief, at 33; Pet. Harlow's Brief, at 41.) But petitioners' assertion can only be accepted by discarding the principles behind the limited exceptions of *Butz*. With respect to the First Amendment violations alleged in this case, it is clear that petitioners would sacrifice the public interest in order to escape even the possibility of responsibility for their abuses of power. Petitioners seek to overturn *Butz*, not to apply it.

A. Grants of absolute immunity are limited to official misconduct within carefully-structured adjudicatory forums insulated from political pressures.

While qualified immunity from damages is the general rule for executive officials charged with constitutional violations, the Court has found that some officials' special functions required a full exemption from liability. *Butz v. Economou, supra,* 438 U.S. at 508. In each case, the officials have exercised judicial or prosecutorial functions. *Butz v. Economou,* 438 U.S. 478 (1978) (agency official acting in quasi-judicial role); *Imbler v. Pachtman,* 424 U.S. 409 (1976) (state prosecutor); *Pierson v. Ray,* 386 U.S. 547 (1967) (state judges); *Bradley v. Fisher,* 80 U.S.(13 Wall.) 335 (1872) (federal judge).

In each case the Court considered the need for unrestricted freedom within a carefully delineated forum and the need for structural barriers against constitutional

violations inherent in the forum -- safeguards to limit the likelihood of and injury from malicious constitutional violations. For example, the courts require total independence from outside pressures, operate within a setting comparatively free of political influence, follow a careful system of legal precedent and correct errors through a well-developed system of appeal. Similarly, within the litigation process prosecutors must be free to argue their cases within unrestrained enthusiasm. Their damage is neutralized within the court by opposing counsel that has an equally free rein. Indeed, abuses by overzealous prosecutors in part are a function of an adversary system that requires vigorous debate to function effectively. *Butz, supra,* 438 U.S. at 508-13.

Petitioners offer no equivalent support for their assertion of immunity. Their position that a President has authority to

order the dismissal of a civil service employee barely merits serious discussion. No federal official has the power to defy the statutes and regulations protecting the rights of federal employees, *Vitarelli v. Seaton*, 359 U.S. 535 (1959), not even the President. *Cf. National Treasury Employees Union v. Reagan*, No. 81-1294 (D.C.Cir. August 11, 1981). Petitioners' characterizations of the alleged misconduct as a routine triviality -- "one of countless such matters" and a "daily" occurrence similar to the grievances of "hundreds of other individuals or groups" (Pet. Harlow's Brief at 66) -- illustrates the core of petitioners' claim. If the President and a small band of senior advisors can fiat away the civil service system adjudicatory process on a routine basis, there are no limits to the scope of their authority.

This is not an instance where an official seeks to operate freely within a limited

adjudicatory structure. Rather, petitioners seek to freely replace the civil service laws with their own preferences, including the discretion to suspend the First Amendment without incurring liability. Of course, the adjudicatory structure does not anticipate arbitrary presidential manipulation. As a result, there are no safeguards built into the process to neutralize presidential abuses of power.

Finally, unlike a jurist insulated from politics, the President and his senior advisors represent the zenith of the political process. Far from being bound by precedent the President routinely must display the flexibility to respond to political pressures, at the expense of consistency. The office maximizes the potential for manipulation of constitutional rights. In short, the nature of the presidency represents the opposite of the governmental structures to which the Court has granted

absolute immunity.

B. The presidential team can function effectively within constitutional limits.

The Court already has considered and rejected the concept that a chief executive's wide range of responsibilities requires freedom from constitutional liability. In *Butz* the Court stated that "*Scheuer* and other cases have recognized that...insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Butz v. Economou, supra,* 438 U.S. at 506-07. The Court noted that *Scheuer* held that the same factors petitioners emphasize -- the broad scope of responsibility and the necessity of acting decisively even during the confusion of a civil disturbance -- do not justify absolute immunity against constitutional suits for the chief executive on the state level. *Id.* at 497. The Court

emphasized the same liability for the constitutional transgressions of federal officials and state officials. "Surely, *federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do *state* officers." *Id.* at 501. *See also Forsyth v. Kleindeinst*, 599 F.2d 1203, 1210-11 (3rd Cir. 1979).

Petitioners' complaints that liability will lead to functional paralysis have a stale, hollow ring. Petitioners offer no empirical support for this time-worn rationalization. If petitioners' theories are correct, state governors have been paralyzed since *Scheuer* and federal employees since the *Butz* decision, since the courts are "habitually requiring" full trials on "mere allegations of [constitutional' malice." Pet. Harlow's Brief, at 63, 65. The record is conspicuously barren of evidence to support petitioners' cry of

wolf.

Moreover, even if correct in the abstract, the excuse would not apply to respondent's claim. Petitioners do not contend that the decision to fire respondent Fitzgerald was a case of crisis decisionmaking or a choice requiring split-second judgment and national leadership. Instead, they characterize it as part of the daily routine. Surely the presidential team does not require immunity to respond effectively to *any* issue, even one that it perceives as a trivial personnel dispute.[1/] Far from justifying absolute

---

[1/] We are confounded by petitioners' reliance on *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949). Even prior to *Butz* that decision was severely modified if not tacitly overruled within the Second Circuit by *Bivens v. Six Unknown Narcotics Agents*, 456 F.2d 1339, 1342 (2d Cir. 1972). *See* Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U.COLO.L.REV. 1, 50-51 (1972). In *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971), the Court did not reach the question of immunity. However, on remand the Second Circuit considered the issue at length. The policy behind the immunity doctrine, the court stated, "is to protect an official who 'may later find himself hard put to it to satisfy a jury of his good faith'." *Bivens, supra*, 456 F.2d at 1344. In order

immunity, the limitless scope of authority claimed by petitioners flies in the face of the Court's reasoning: "Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct.

---

to apply this policy, the court fashioned a two-step test. First, a determination must be made as to whether the officials "acted manifestly or palpably beyond their authority." *Bivens, supra,* at 1345. The second step goes well beyond the inquiry made in *Gregoire,* which is limited to a determination of the officials' scope of authority. *Gregoire, supra,* 177 F.2d at 581. If an official establishes that he was acting within the scope of his authority he must further show that the acts complained of were within "the sound exercise of discretionary authority." *Bivens, supra,* 456 F.2d at 1345 (quoting *Barr v. Matteo,* 360 U.S. 564, 575 (1959)).

While the doomsday predictions of *Gregoire v. Biddle, supra,* are persuasive, long before *Butz* they had ceased to represent the law even in the Second Circuit. *Gregoire* must be read in light of the Second Circuit's decision in *Bivens, supra.* Careful attention must be given to the specific acts complained of and the need of the public official to perform those acts. A simple determination that the act was within the perimeter of the official's authority is no longer sufficient. Consequently, petitioners' reliance on *Gregoire v. Biddle,* which mandates a "necessity" prerequisite for the application of immunity, is erroneous. In the absence of empirical support, petitioners cannot evade constitutional liability on the basis of overruled rhetoric.

Extensive Government operations offer opportunities for unconstitutional action on a massive scale." *Butz v. Economou, supra,* 438 U.S. at 506.

C. Qualified immunity is absolutely necessary to protect the public's First Amendment interest in the contributions of government employees to full and informed debate on public policy.

The public's interest in the value of First Amendment contributions by government employees far outweighs any advantages obtained by offering the President a blank check to violate personal liberties without judicial accountability. Implicit in *Pickering v. Board of Education,* 391 U.S. 563 (1968), is the Court's recognition that permitting retaliation for the exercise of dissent would deter government employees from speaking out. Recognizing the value of dissent under the First Amendment both

for the individual and for society, *Pickering* established a balancing test to determine constitutionally-protected speech. The test compares the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as employer, in promoting the efficiency of the public services it performs through its employees. *Pickering, supra,* 391 U.S. at 568.

The balancing test is uniquely suited to weigh petitioners' concerns about avoiding disruption through personal liability with the public value of an individual's constitutional rights. While the precise application of the *Pickering* balancing criteria varies with each case,[2/]

[2/] The test is flexible and can be tailored to the requirements of individual jobs. As one commentator has noted, "[E]mployees can be arrayed on a spectrum, from university professors at one end to policemen at the other." *Free Speech and Impermissible Motive in the Dismissal of Public Employees,* 89 YALE L. J. 376, 381 n. 43 (1979).

> Some of the factors that appear to have entered into the "balancing" in such cases include the sensitivity and confidential nature of the employee's position and the government's consequently legitimate need for secrecy; the nature of the subject on which the employee speaks out; any interference with the performance of his job resulting from the speech; the context of the speech and accompanying conduct; its anticipated effect on agency morale and upon working relationships with immediate superiors.

Hanson v. Hoffman, 628 F.2d 42, 50 (D.C. Cir. 1980). More than with any other constitutional right, these factors facilitate direct comparison on a case-by-case basis of the public interest in absolute immunity with the public benefits that underlie the First Amendment.[3/]

[3/] At least for constitutional suits under the First Amendment, the *Pickering* tests eliminate any credibility for petitioners' point that frivolous suits go to trial. A far better test is merely to determine whether plaintiff engaged in protected speech. It is no mean feat to prove that speech is constitutionally protected under the First Amendment. Indeed, if plaintiffs had to prove retaliatory malice by clear and convincing evidence

There is no question that speech protected by the First Amendment contributes heavily to healthy decisionmaking within government agencies.

> Government employees may thus make important contributions to the discussion of public issues, and those contributions may become the more vital as the viewpoint of the speaker diverges from official policy. Furthermore, freedom of expression on the part of government employees can play an important role in counteracting those stultifying forces which customarily pervade bureaucracy. Organizational pressures toward dullness and conformity in the public service can perhaps be partly overcome by establishing firm principles that encourage, or at least protect, diversity in opinion and discussion.

T. Emerson, *The System of Freedom of Expression*, 563-64 (1970).

---

before trial as petitioners suggest, Pet. Harlow's Brief at 67-8, their burden of proof would be higher to survive a motion for summary judgment than to reverse the burden of proof to defendants at trial. Petitioners' suggestion would carve a loophole in the Federal Rules of Civil Procedure for presidential liability. But more significant, it would completely reverse the burdens of proof developed over the last decade to test First Amendment claims.

Equally significant, government experts who are free to testify truthfully at public hearings are essential tools of government accountability.

> Expression of this sort, taking place in the public arena, falls more clearly within the main currents of the system of freedom of expression. It involves an effort to alert the public to problems buried in the depths of the bureaucracy, or at least to participate in open discussion of public affairs. It thus serves one of the basic purposes of the First Amendment in aiding the citizenry to check upon the operations of government. This function is enhanced when the particular employee has a special knowledge of the facts, a particularly relevant experience, or other forms of expertise.

Id. at 574.

Congress included 5 U.S.C. § 2302(b)(8)[4/]

[4/] 5 U.S.C. § 2302(b)(8) provides protection against reprisal for "a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--(i) a violation of any law, rule or regulation, or (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not

in the Civil Service Reform Act of 1978, *supra*, in explicit recognition of the need "to protect whistleblowers from improper reprisals." *Report of the Senate Committee on Governmental Affairs on S.2640*, Rep.No. 95-969, 95th Cong., 2nd Sess. 8 (1978). In fact, the legislative history of the Reform Act refers to respondent Fitzgerald's experience to illustrate the necessity of a statutory shield:

> Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast Federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a Federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to *assure them* that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon

---

specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs...."

> employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants. These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation. (Emphasis added.)

Id. The experience of the Civil Service Reform Act has been a bitter disappointment for whistleblowers. Despite the legislative mandate, the quasi-judicial Merit Systems Protection Board has failed to find a single example of illegal retaliation against whistleblowers. The congressional evaluation was clear, however. The public interest requires freedom for government employees to engage in legitimate, constructive dissent.

Respondent's experience illustrates several significant values of protected speech. His cause of action for violating 5 U.S.C. § 7211 is merely one example of the interests served by the First Amend-

ment, but it is of fundamental importance to the separation of powers and to proper congressional oversight. The statute declares:

> The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or member thereof may not be interfered with or denied.

It was passed in 1912 to reverse President Taft's "gag rule" forbidding civil servants from communicating information to Congress without the consent of department chiefs. The law was passed to codify First Amendment rights and to reestablish the free flow of information to Congress. As one supporter declared:

> How can a conscientious Member of Congress vote intelligently and for the best interests of the American people if the most reliable sources of information are closed to him? I am glad that this rule is to be abrogated, not only because of my sympathy for these men, who have been unreasonably

> restrained in their rights as citizens, but I am glad because hereafter I shall be free to seek and secure information that will enable me the better to discharge my duties as a Representative.

Appendix to 48 CONG. REC. 140 (1912) (remarks of Representative Stone). The bill's sponsor characterized the "gag rule" as "un-American, unjust. It may fit into the scheme of things in a country like Russia, but it is entirely antagonistic to the spirit of our institutions. It is a slap at the Constitution and an affront to our citizens."[5/] 48 CONG. REC. 10671

[5/] Representative Lloyd explained:

> If no Government employee is permitted to speak, excepting through his department chiefs, and the department chief through the Cabinet officer, then this is an aristocratic Government, dominated completely by the official family of the President. If the principle enunciated in these Executive orders is to be carried to the extreme, then there is no possible way of obtaining information excepting through the Cabinet officers, and if these officials desire to withhold information and suppress the truth

(1912) (remarks of Representative Lloyd). In short, presidential retaliation against government employees for protected speech not only slaps the constitutional liberties of individual public employees and deteriorates the quality of public policy decisions, it also threatens our constitutional system of checks and balances by impeding the free flow of information necessary for effective congressional oversight. Certainly in contexts such as respondent's 1968 Senate testimony, the public interest in promoting free speech overwhelms the public interest in removing the presidential team from uncertainties about their liability for snuffing it out.

---

or to conceal their official acts it is within their power to do so. This Government will be more popular when its official proceedings are an open book and the conduct of its officials continuously subject to scrutiny and investigation by the people at any time and in any manner the people elect. 48 CONG. REC. 10671 (1912) (Remarks of Representative Lloyd).

The content of respondent's speech served an essential function by combatting gross waste of the taxpayers' funds, an approximately $2 billion cost overrun, on a key weapons purchase. The sky may have been the limit on the C5-A overrun if respondent Fitzgerald had not blown the whistle. Of even greater significance, his disclosure facilitated the exposure of a dangerous military "lemon" that could have directly threatened the national security. Certainly petitioner Nixon should not challenge the essential nature of respondent's speech. Thirty years ago respondent Nixon declared:

> Mr. President, I have introduced in the Senate today a bill to make it a violation of law for any officer of the Federal Government to dismiss or otherwise discipline a Government employee for testifying before a committee of Congress.
>
> ...It is essential to the security of the Nation and the very lives of the people, as we look into these vitally important issues, that every witness

> have complete freedom from reprisal when he is given an opportunity to tell what he knows.
>
> There is too much at stake to permit foreign policy and military strategy to be established on the basis of half truths and the suppression of testimony.
>
> Unless protection is given to witnesses who are members of the armed services or employees of the Government, the scheduled hearings will amount to no more than a parade of yes men for administration policies as they exist.

97 CONG. REC. 4393 (1951) (remarks of Senator Nixon).

On balance, the courts have directly weighed the interest of preventing disruption against the value of First Amendment rights. The court in *Porter v. Califano*, 592 F.2d 770 (5th Cir. 1979), addressed this point with great clarity. In a case where a clerk-typist exposed corruption in the office the court found that:

> [I]t would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordi-

> nates who blow the whistle simply because the speech somewhat disrupted the office.

Id. at 773-74. This is particularly true in respondent's case. His speech served *both* the *Pickering* factors, increased government efficiency and freedom of expression, interests normally at odds.

Respondent's experience demonstrates the public interests sacrificed when a President presumes to be the owner of government information, rather than the catalyst.

Certainly this case presents a clear test of the protection the Court offers for the First Amendment. If the President or his senior advisors are absolutely immune from damages for firing respondent Fitzgerald, then the presidential team has the authority to totally "gag" nearly three million employees, regardless of the public importance of the issues, without fear of judicial liability.

II. *BUTZ v. ECONOMOU* MANDATES THAT DAMAGES ARE ESSENTIAL TO PROVIDE COMPREHENSIVE RELIEF, TO DETER FUTURE CONSTITUTIONAL ABUSES AND TO REDUCE THE CHILLING EFFECT OF UNCERTAIN FIRST AMENDMENT COVERAGE.

A. Damages are an appropriate remedy for First Amendment violations.

The Court has cautioned that "[a]bsent congressional authorization, a court may also be impelled to think more carefully about whether the type of injury sustained by the plaintiff is normally compensable in damages...." *Butz v. Economou, supra,* 438 U.S. at 503. This caution is well taken but not applicable to respondent's case.

The explicit concern of the *Butz* Court was to protect citizens from federal executive officials whose "broad authority... enables them to direct subordinates to undertake a wide range of projects -- including some which may infringe such

important personal interests as liberty, property, and *free speech*." *Butz v. Economou, supra*, at 505 (emphasis added). In view of the Court's language in *Butz*, there should be little doubt that damages are the appropriate remedy for First Amendment violations.

Indirectly, the Court already has endorsed damages for First Amendment violations in the context of § 1983 suits. In *Carey v. Piphus*, 435 U.S. 247 (1978), a suit brought under 42 U.S.C. § 1983 by public school students for violation of due process rights, the Court stated that "[r]ights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect." *Id.* at 254.[6/] The Court observed that

---

[6/] Since freedom of expression serves both the individual's interest and the public interest in

lower federal courts generally agree that "awards under §1983 should be determined by the compensation principle." *Id.* at 255.

It cannot seriously be maintained that constitutional rights compensable under 42 U.S.C. § 1983 are transformed when a suit is brought directly under the Constitution against federal officials. The words of the Court in *Butz, supra,* support this contention. To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does federal officials is to stand the constitutional design on its head." *Butz v. Economou, supra,* 438 U.S. at 504. Accordingly, First Amendment rights which are compensable under § 1983 should be no

---

government accountability, the analysis in the previous section of public benefits applies equally to damages.

less compensable in a direct suit under the Constitution.

Carey v. Piphus, supra, 435 U.S. at 255 n. 8, cites two cases that establish First Amendment violations within the scope of § 1983: *Stolberg v. Members of Bd. of Trustees for the State Colleges of the State of Connecticut,* 474 F.2d 485 (2d Cir. 1973), and *Donovan v. Reinbold,* 433 F.2d 738 (9th Cir. 1970). In both cases the plaintiffs brought suit under 42 U.S.C. § 1983 for violations of their First Amendment rights. In *Stolberg, supra,* plaintiff, a professor, was denied renewal of his contract and consequently denied tenure. The trial court found this to be a retaliatory employment practice in violation of plaintiff's First Amendment rights. The court ordered reinstatement and back pay. On appeal the Second Circuit considered the trial court's denial of compensatory

damages.[7] There the court found that, "compensatory damages...were denied for failure of proof...." *Stolberg, supra,* 474 F.2d at 488. However, the court clearly stated that,"[A] district court may award damages for emotional distress ... found to have resulted from loss of a public job... from which [plaintiff] has been *unconstitutionally dismissed...."* *Stolberg, supra,* at 489 (emphasis added).

Donovan v. Reinbold, supra, offers a similar analysis. Again plaintiff was fired from his job for exercise of First Amendment rights. The Ninth Circuit considered the award of compensatory damages and found that they were proper. The court noted that "[d]amages can...be awarded for emotional and mental distress caused by an intentional tort" and found that the

---

[7] The Second Circuit awarded attorneys fees in order that "plaintiff and others...are not deterred from securing such vindication [of constitutional rights] by the prospect of costly, protracted proceedings.... *Stolberg, supra,* at 490.

evidence "including the evidence of [plaintiff's] emotional distress resulting from his loss of employment" was sufficient to sustain the district court's finding of compensatory damages. *Donovan, supra,* at 743.

It is not surprising that *Carey* cited precedents of damages for First Amendment violations under §1983. Historically, the Court has recognized the close interrelationship between First and Fourth Amendments as expressions of personal liberty. *Cf. Stanford v. State of Texas,* 379 U.S. 476, 484-85 (1965); *Marcus v. Search Warrant* , 367 U.S. 717, 731-32 (1961). And as *Bivens v. Six Unknown Narcotics Agents,* 403 U.S. 388, 395 (1971) explained, "Historically damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." It is persuasive that the ourts have recognized this premise by permitting causes of

action under *Bivens* for First Amendment suits. *See, e.g. Patton v. LaPrade*, 524 F.2d 862, 869 (3d Cir. 1975); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 160 (D.D.C. 1976); *Butler v. United States*, 365 F. Supp. 1035, 1039 (D. Haw. 1973).

B. Only damages provide comprehensive, effective relief.

Petitioners claim that statutory remedies represent an effective substitute that defeats a *Bivens* cause of action.*/ (Pet. Harlow's Brief at 34.) Initially, respondents fundamentally misread *Carlson v. Green*, 446 U.S. 14 (1980), by relying on *Bush v. Lucas*, 647 F.2d 573 (5th Cir. 1981). *Bush* also inferred that an alternative statutory remedy is a special factor counselling hesitation and declared the Civil Service Reform Act as adequate

---

*/ Respondents raise this issue despite the restrictions of Supreme Court Rule 34.1(a).

substitute. *Bush, supra* 576-77.

There is nothing in the case law that suggests the special relationship of government employment denies a damage remedy altogether. Indeed, *Bush, id.* at 576, cites *Pickering* for the existence of the special relationship. But *Pickering, supra,* 391 U.S. at 568, established a balancing test to determine judicial oversight of First Amendment claims, not a prohibition.

The *Bush* analysis of alternative remedies ignores major portions of *Carlson* which rejected an alternative remedy under the Federal Tort Claims Act as inadequate for failure to include damages and a jury trial. *Carlson, supra,* 446 U.S. at 21 and 446 U.S. at 28n.1 (Powell, J., concurring).[8/] In fact, only damages can

---

[8/] Significantly, *Bush* is premised on the carefully constructed system of congressional control of the civil service system. *Bush, supra,* 647 F.2d at 576.

provide an adequate substitute remedy for respondent. The ineffectiveness of reinstatement as an equivalent remedy is clear in light of respondent's eight year fight -- since he "won" administrative relief -- to regain a job equivalent to the one he lost in retaliation for whistleblowing. *See Fitzgerald v. Hampton*, No. 76-1486 (D.D.C. Mar. 3, 1981).

Finally, administrative relief would not provide respondent a comprehensive remedy. It would not compensate him for over $500,000 legal fees incurred for which administrative relief is unavailable. *Fitzgerald v. United States Civil Service Commission*, 554 F.2d 1186 (D.C. Cir. 1977). It would not compensate him for the emotional damage he has suffered due to twelve

---

That same argument squarely defeats petitioners' claim that civil service personnel actions are a presidential function.

years of isolation and professional harassment. The courts are capable of assessing the relevant measure of relief for this type of personal nightmare. *Carey v. Piphus, supra,* 435 U.S. at 263-64.

Finally, only damages can compensate respondent for unconscionable preconditions for retaining his job. It is important to remember that respondent Fitzgerald was fired merely for telling the truth to a congressional committee. Had he been under oath, apparently he would have been expected to incur criminal liability. Even in the absence of criminal sanctions, the price of continuing his career was to violate his duty to the public as a government employee. *See Swaaley v. United States,* 376 F.2d 857, 865 (Ct. Cl. 1967); *Downs v. Conway School District,* 328 F. Supp. 338, 348 (E.D. Ark. 1971).

When respondent testified in 1968 he

was fulfilling a duty Congress first recognized 23 years ago in the Code of Ethics for Government Service, H.R. Con. Res. 175, 72 Stat. B12 (1958):[9/]

> Any Person in Government Service Should:
>
> Put loyalty to the highest moral principles and to country above loyalty to persons, parties or Government department.
>
> UPHOLD The Constitution, laws, and legal regulations of the United States and all governments therein and never be a party to their evasion.
>
> * * *
>
> SEEK to find and employ more efficient and economical ways of getting tasks accomplished.
>
> * * *
>
> EXPOSE corruption wherever discovered.
>
> UPHOLD these principles, ever conscious that public office is a public trust.

Forcing a government employee to desert his or her duty to the public is a

---

[9/] Last year the Code was enacted into law. PL 96-303 (July 3, 1980).

fundamental invasion of human dignity. Reinstatement cannot compensate for the humiliating choice between career and conscience forced upon government employees. As Justice Harlan stated in *Bivens, supra,* 403 U.S. at 410 (Harlan, J. concurring), "For people in Bivens' shoes, it is damages or nothing."

C. Damages are essential for the public goal of deterring future constitutional violations.

Butz explicitly recognized that damages are necessary to "in any degree deter federal officials from committing constitutional wrongs." *Butz,supra,* 438 U.S. at 505. In a related context, *Carlson* cited deterrence and individual liability in rejecting the FTCA as an adequate substitute for a *Bivens* action. "Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than

the FTCA remedy against the United States. It is almost axiomatic that the threat of damages has a deterrent effect..." *Carlson v. Green, supra,* 446 U.S. at 21(1980) (citations omitted).

The necessity to deter repeat performances of the nightmare respondent Fitzgerald endured is a decisive factor mandating damages. Without the threat of liability, at worst an unscrupulous President may not succeed in muzzling or punishing a forthright employee.[10/]

[10/] Even the reference in *Bush* to the Civil Service Reform Act would leave a loophole for presidential accountability. At best it would abdicate the deterrence goal of Butz. While the Reform Act contains an adjudicatory process theoretically to discipline those who violate the merit system, 5 U.S.C. §1206(g)(1), complaints against presidential advisors would bypass the system and go directly to the President, 5 U.S.C. §1206(g)(2). Since the advisors conceivably could be engaging in First Amendment retaliations at the Presidents direction, there is little structural guarentee for accountability. Of decisive

D. Damages are necessary to neutralize the chilling factors of presidential power and uncertain First Amendment coverage.

Despite the public value of whistleblowing, most government employees are afraid to tell the truth.[11/] That is hardly surprising in light of respondent Fitzgerald's experience. He has accomplished a series of pyrrhic victories but has not yet reattained a meaningful job at the Pentagon, let alone his former position . They observe the cruel

---

significance, there is *nowhere* to file an administrative complaint for presidential retaliation. The courts are the *only* forum available for plaintiffs to pursue any remedy against presidential reprisals, or where liability can deter future abuses.

11/ A recent survey of federal employees by the Merit Systems Protection Board found that 96% definitely or probably approved of whistleblowing and 45% had personally observed or obtained direct evidence of illegal or wasteful practices. Almost one-fourth (23%) claimed personal knowledge of fraud or waste involving more than $1,000 of government assets while 9% set the figure in excess of $100,000. Yet, less than 20% of employees took the initiative to make an official

joke of statutory civil service reform. *See Civil Service Reform Oversight, 1981 -- Whistleblower: Hearings before the Subcommittee on Civil Service of the House Post Office Committee,* 96th Cong., 2d Sess. 80-151 (1980). They are faced with the uncertainty of satisfying the tests for constitutionally-protected speech:

> At once it becomes impossible, as Justice Marshall himself acknowledged, to formulate any workable standard of judgment. Thus a government employee cannot conceivably know in advance how much weight should be given to the circumstance that he may have a specially "informed and definite opinion" about the issue, or that the agency could "easily have rebutted" his errors.

J. Emerson, *supra*, at 581. And surely federal employees need no reminders of the awesome power of the presidency.

In short, while whistleblowing strongly

---

report of the misconduct. Merit Systems Protection Board Office of Merit Systems Review and Studies, *Do Federal Employees Face Reprisal for Reporting Fraud, Waste or Mismanagement?* (April, 1981).

serves the public interest, employees will remain hesitant to exercise the First Amendment in light of the risks inherent in asserting their rights and consciences. In order to follow their consciences, whistleblowers must gamble their careers and their financial security. The chilling effect is severe, to say the least.

The Court can minimize these deterrents against honesty by offering damages to employees unconstitutionally victimized by those with the most power to abuse, the President and his senior advisors. In that way, whistleblowers at least would have the possibility of eventual financial recoupment for a lost career. In light of the miserable failure of statutory civil service reform, however, closing the door on damages may effectively silence the bureaucracy.

CONCLUSION

Petitioners' claim for absolute immunity asserts that any presidential actions are unreviewable by the courts. Extension of absolute immunity to petitioners would place the fiat of these officials above the Constitution. Freedom of expression by public employees is "absolutely essential" for the effective functioning of government. No case could illustrate more vividly than respondent's that the value of exposing a $2 billion cost overrun dwarfs the claim of any individual to ignore with impunity the Constitution, the civil service system, and the public interest. The words of Lord Acton have no less force today. "Power tends to corrupt and absolute power corrupts absolutely." The decision of the court of appeals should be affirmed.